



DEPARTMENT OF THE NAVY
GENERAL COUNSEL OF THE NAVY
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WASHINGTON DC 20350-1000

ACTION MEMO

December 18, 2008

FOR: SECRETARY OF THE NAVY

FROM: Frank R. Jimenez, General Counsel of the Navy


SUBJECT: Alternative Dispute Resolution (ADR) Policy Review

- At the November SMR, OGC was asked whether clarification of the requirement to accept ADR is needed. Equal Employment Opportunity (EEO) data from FY 08 indicates that the DON rejected ADR 297 times out of 647 opportunities at the informal EEO counseling stage.
- Basic ADR policy is found in paragraph 7 of SECNAVINST 5800.13A (TAB A). This policy language has been used by the Department of the Navy with only minor variation since 1996, and it is consistent with policies in other DoD organizations. Although Navy policy uses "shall" language, it leaves room for rejection if ADR is not "practicable." Sometimes cost or availability of ADR services, for example, might be an issue. Other times, ADR might not be appropriate for reason found in 5 U.S.C. § 572(b). These reasons include, for example, the need for legal precedent, the need for a full public record, a significant question of public policy, and the treatment of third parties.
- Chapter III of the EEO Discrimination Complaints Manual implements the basic ADR policy for the processing of EEO complaints. Although it vests discretion to decline ADR at the activity level, it does not provide any guidance or procedures regarding how the decisions are reached or documented.
- The 46% (297 out of 647) agency rejection rate in the EEO data is more than should be expected under accepted grounds for rejection, such as those found in 5 U.S.C. § 572. Although the Secretary of the Navy is the party at interest in EEO complaints, While neither the ADR Program nor NAVOECMA collect data on this issue. They believe that in many cases ADR may be declined by the first-level managers who also may be the subject of the complaint or are a party to the events. Recognizing that the Secretary of the Navy is the real party in EEO complaints, the better practice would be to require written decisions to decline ADR at a supervisory level above those

directly involved in the issue or charge. This would not change current EEO timelines nor impose additional burdens on complainants.

- Revising the general policy in SECNAVINST 5800.13A is not necessary. However, the DON Discrimination Complaints Manual, part of CHRM 1614.1, should be revised to authorize rejections only by disinterested second level supervisors or above. Rejections should be in writing, articulate and justify a well-founded reason, and be signed. Copies should be forwarded to the DON ADR Program for trend analysis, but not approval.
- ASN (M&RA) and Naval Office of EEO Complaints and Adjudication (NAVOECMA) concur in this recommendation.

RECOMMENDATION: That NAVOECMA, in coordination with the Assistant General Counsel (ADR), change the DON Discrimination Complaints Manual as stated above.

December 31, 2008
Approve  Disapprove _____

COORDINATION: ASN (M&RA); NAVOECMA

ATTACHMENTS: As stated

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